upon any representations made by third parties, but solely on the grounds that they accepted the stock issued for less than par. The obligation to pay par value for the benefit of creditors is based not on fraud but primarily on statute. Unless the creditor who is seeking to enforce that liability had knowledge of an agreement that the stock was issued as fully paid, he should be able to invoke the general rule. And the burden, moreover, of proving that knowledge should be on the defendant.[18] Nor was he in any way charged with notice by the records of the corporation, because until he became a creditor he had no right to inspect the corporate books. As to third persons, the books of the corporation are private books.[19] It is submitted that the salutary rule laid down in the Vermont Marble case should be limited no further than the exception of Sherman v. Harley, that only a creditor who has actual knowledge that the discounted stock was issued as fully paid may not recover the unpaid balance from the stockholders. *H. A. B.*

DELIVERY OF DEEDS: CONDITIONAL DELIVERY TO THE GRANTEE —Though it seems to have been a well-settled rule in California that where a grantor delivers his deed to the grantee, without any express reservation of the right to recall it, and with intent that in a certain contingency it shall be effective without any further act on the part of the grantor, such delivery is effectual to pass title presently,[1] and though it is so provided in the code,[2] the rule was apparently overlooked in the case of *Gaschlin v. Sierra*.[3]

In this case, the grantor caused a deed to be made to the plaintiff as grantee, which he signed and acknowledged before a notary, and taking the plaintiff with him to the safe deposit vault, handed the deed to the plaintiff, saying, "This is what the old man has done for you. This is yours." The plaintiff read the deed through and handed it back to the grantor, who then asked

[18] Herron v. Shaw, supra, n. 2; Johns v. Clother (1914) 78 Wash. 602, 139 Pac. 755.

[19] National Bank etc. v. Western Pacific Ry. Co. (1910) 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987; Gilkie etc. Co. v. Dawson Town etc. Co. (1895) 46 Neb. 333, 64 N. W. 978, 1097. Cal. Civ. Code, § 378, limits the right of inspection of the corporation's books to directors, stockholders and existing creditors, the public at large having no such right.

[1] See 2 Devlin on Deeds, § 314; Mowry v. Heney (1890) 86 Cal. 471, 25 Pac. 17; Kenniff v. Caulfied (1903) 140 Cal. 34, 73 Pac. 803; King v. Fragley (1912) 19 Cal. App. 735, 127 Pac. 813; Hammond v. McCullough (1911) 159 Cal. 639, 115 Pac. 216; Follmer v. Rohrer (1910) 158 Cal. 755, 112 Pac. 544; Lewis v. Brown (1913) 22 Cal. App. 38, 133 Pac. 331; Fisher v. Fisher (1913) 23 Cal. App. 310, 137 Pac. 1094; Bias v. Reed (1914) 169 Cal. 33, 145 Pac. 516; Hefner v. Sealey (1917) 175 Cal. 18, 164 Pac. 898.

[2] Cal. Civ. Code, § 1056. "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery is made."

[3] (June 3, 1920) 32 Cal. App. Dec. 462.

him for ten dollars, the consideration named in the deed, which the plaintiff gave to the grantor. The grantor caused the plaintiff to be given access to the box in which the grantor placed the deed, and the grantee received a key to the box. Later the grantor said, "When I am passed out, take that deed and have it recorded." The grantor, however, remained in possession and control of the premises until his death more than five years later. There was evidence that within two years previous to his death, he had sent for and destroyed the deed. A non-suit was affirmed on the ground that the plaintiff had not sufficiently shown a delivery "with the intent on the part of the grantor to presently convey title," and that upon the face of the transaction, it was the intention of the grantor to make a testamentary disposition of the property.

The case in this jurisdiction most closely resembling the present is the decision of the Supreme Court in Donohue v. Sweeney.[4] There is but little to distinguish these cases on their facts from the previous cases where the delivery has been held effectual to pass title. In the principal case, the payment of the consideration, in connection with the words used and giving of access to the box in which the deed was kept, presents clear evidence of an intention on the part of the grantor to divest himself of his title. While the words used in the Donohue case do not express that intention so clearly as in the case under comment, the subsequent declarations of the grantor that the grantee should keep the property in repair for the reason that it was his, showed an intent that the deed should be operative. In both cases, the intent seems to have been clear that the instrument should operate presently to transfer title, but that there should be a postponement of enjoyment until after the death of the grantor. If the intent was to pass a present interest, the delivery was effectual to vest title in the grantee freed from any condition not expressed in the deed. The request of the grantor to the grantee not to cause the deed to be recorded until after the death of the grantor could not have the effect of creating a life interest or estate in the grantor.[5] In effect, the grantor attempts to impose a condition upon the operation of the deed, which by the provisions of section 1056 of the Civil Code is void. The courts both in the Donohue case and in Gaschlin v. Sierra confuse the intent to convey title presently on condition that the use and enjoyment shall remain in the grantor for life, and the intent that title shall not pass until after the death of the grantor. It is to be noted that in neither case was the Civil Code section or the principles of the common law

[4] (1915) 171 Cal. 388, 153 Pac. 708. A mother handed a deed to her son, saying, "You take this from my hand, they are your deed to the place we are living in. . . . . You take them and place them in the box. So you can say that they were delivered. You received them from me." This was held not to amount to a delivery. Cf. Stanton v. Freeman (1912) 19 Cal. App. 464, 126 Pac. 377.

[5] See Lewis v. Brown, supra, n. 1.

respecting conditional delivery to the grantee referred to by the court.[6]

Though the decision in the Gaschlin case apparently conflicts with the common law rule, enacted into statute law in California, it may be that the principle regarding conditional delivery is itself an outworn dogma. It is difficult to understand why in modern law there should not be a conditional delivery to the grantee valid as between the parties, as there unquestionably can be to a third person for the grantee's benefit. The rule expressed in the section of the Civil Code referred to is a medieval guaranty for the protection of bona fide purchasers and others dealing with land under a legal system which was a stranger to the principles of equity and equitable estoppel. Nowadays, since the law has become infused with commercial principles, it would seem that the intent of the parties that a delivery should be conditional only, might well have effect between the original parties, leaving bona fide purchasers and others dealing with the property to be protected by the numerous principles and institutions, such as that of recording, evolved by courts and legislatures for their security. Indeed, even the ancient rule has received some relaxations. Thus, it is unquestioned law today that merely handing an instrument to the grantee does not necessarily amount to a delivery.[7] But this is a proposition quite different from saying that a formal handing of a deed to the grantee with a condition attached as to when it shall be operative is not a delivery, as the courts decided in the two cases discussed above. Until the legislature changes section 1056 of the Civil Code, the legal profession must continue to recognize the ancient law as still in force, notwithstanding decisions apparently in conflict with it. *B. B. L.*

EVIDENCE: ADMISSION BY SILENCE WHILE UNDER ARREST—The courts have gone far, perhaps too far, in protecting the defendant against being compelled to disclose his guilt out of court. A confession is often excluded on technical grounds having little bearing on the probable truth of the confession.[1] On the other hand, in the actual administration of the law, third-degree methods are pursued daily in violation of law and nothing is done about it. The decision in *People v. Graney*[2] will tend in Cali-

[6] An examination of the briefs in Donahue v. Sweeney discloses the fact that neither the code section nor the principle there stated was referred to by counsel. In Stanton v. Freeman, supra, the language of the court indicates that the difference between a delivery to a third person and to the grantee was not in the mind of the court. In that case, too, there is no reference to the rule embodied in § 1056 of the Civil Code.

[7] Denis v. Velati (1892) 96 Cal. 223, 31 Pac. 1; Black v. Sharkey (1894) 104 Cal. 279, 37 Pac. 939; Elliott v. Merchants' Bank & Trust Co. (1913) 21 Cal. App. 536, 132 Pac. 280.

[1] People v. Loper (1910) 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912 B 1193; 2 Cal. Law Review, 241.

[2] (July 30, 1920) 32 Cal. App. Dec. 1098.